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NEARING THE END OF FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias*

In continuing the series of essays which evaluate and document the phenomenon of federal civil justice reform,¹ this essay initially affords an update on recent developments in civil justice reform at the national level and in the United States District Court for the District of Montana (Montana District). The essay emphasizes the conclusion of two major studies that analyze the national reform effort and the submission to Congress of reports and a recommendation, which were premised substantially on these studies, by the Judicial Conference of the United States. The essay also stresses the completion by the Ninth Circuit District Local Rules Review Committee of its work as well as issues implicating case assignments and the future of civil justice reform in the Montana District. The essay concludes with a look into the future.

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and Ann and Tom Boone and the Harris Trust for generous, continuing support. I serve on the Ninth Circuit District Local Rules Review Committee and on the Advisory Group that the United States District Court for the District of Montana has appointed under the Civil Justice Reform Act of 1990; however, the views expressed here and errors that remain are mine.

1. See Carl Tobias, *Contemplating the End of Federal Civil Justice Reform in Montana*, 58 MONT. L. REV. 281 (1997) [hereinafter Tobias, *Contemplating*]; Carl Tobias, *Ongoing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 511 (1996); Carl Tobias, *Continuing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 143 (1996) [hereinafter Tobias, *Continuing*]; Carl Tobias, *Refining Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 539 (1995) [hereinafter Tobias, *Refining*]; Carl Tobias, *Re-evaluating Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 307 (1995) [hereinafter Tobias, *Re-evaluating*]; Carl Tobias, *Evaluating Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 449 (1994); Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235 (1994); Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357 (1993); Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89 (1993); Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992); Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992); Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 437-51 (1991).

I. CIVIL JUSTICE REFORM UPDATE

A. *National Developments*

Several important national developments in federal civil justice reform which implicate the federal district courts have happened since I reported on reform in the issue of the *Montana Law Review* that was published a year ago.² I examined ongoing experimentation with measures for decreasing expense and delay which the Montana Federal District Court and the other federal districts have undertaken pursuant to the Civil Justice Reform Act (CJRA) of 1990.³ Since that time, a number of the thirty-four Early Implementation District Courts (EIDC), of which the Montana Federal District Court is one, and practically all of the other sixty districts that are not EIDCs have essentially finished their experimentation with measures for limiting cost and delay and have continued assessing those procedures' effectiveness.⁴

1. Pilot and Demonstration District Court Experimentation and Studies of that Experimentation

The national evaluations of the civil justice reform effort which Congress required have also been completed. The CJRA mandated that ten federal district courts experiment with six statutorily-prescribed principles and guidelines of litigation management and cost and delay reduction.⁵ The legislation concomitantly required that an "independent organization with expertise in the area of Federal court management" perform a thorough assessment of procedures being applied by these pilot districts.⁶ The statute also commanded five federal courts to participate in a demonstration program, whereby the Western District of Michigan and the Northern District of Ohio experimented with differentiated case management and the Northern District of California, the Western District of Missouri, and the Northern District

2. See Tobias, *Contemplating*, *supra* note 1, at 281-83.

3. See *id.*

4. All districts had to issue civil justice expense and delay reduction plans by December 1993. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(b)(1), 104 Stat. 5089, 5096 (1990); see also Annual Report of the Advisory Group of the United States District Court for the Eastern District of Kentucky (1996) (analyzing CJRA procedures).

5. See Judicial Improvements Act § 105(b), 104 Stat. at 5097-98; see also 28 U.S.C. § 473(a)(1)-(6) (1994).

6. Judicial Improvements Act § 105(c)(1), 104 Stat. at 5098. The RAND Corporation undertook that assessment.

of West Virginia experimented with various methods of expense and delay reduction, including alternatives to dispute resolution (ADR).⁷ Congress correspondingly required that the Judicial Conference of the United States, the policymaking arm of the federal courts, in consultation with the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts, major research arms of the federal courts, comprehensively analyze the efficacy of procedures applied by those districts.⁸ Moreover, Congress requested that the Judicial Conference submit to Congress reports on the pilot and demonstration court experimentation and a recommendation on whether the pilot project warranted expansion.⁹

During September, 1996, the RAND Corporation issued its final study of experimentation with expense and delay reduction measures in the ten pilot districts, and in January, 1997, the FJC published its final study of the procedures applied in the demonstration districts. Perhaps the most interesting aspect of the thorough, searching analysis which RAND performed was its finding that experimentation by the federal districts for six years had little impact on cost and delay in civil litigation but that judicial case management can save time and perhaps expense.¹⁰ The FJC correspondingly determined that some alternatives to dispute resolution can increase settlements but may impose costs and that differentiated case management can afford certain benefits.¹¹

2. Judicial Conference Reports and Recommendation

a. Conference Recommendation

The Judicial Conference of the United States relied substantially on the findings of the RAND Corporation and the FJC when compiling the reports and the recommendation for Congress on the pilot and demonstration district court programs which the Conference submitted in May, 1997.¹² The CJRA re-

7. See Judicial Improvements Act § 104(b), 104 Stat. at 5097.

8. See Judicial Improvements Act § 104(c), 104 Stat. at 5097. The Federal Judicial Center actually undertook the study.

9. See Judicial Improvements Act §§ 104(d), 105(c), 104 Stat. at 5097-98.

10. See James S. Kakalik et al., *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 1-2* (1996).

11. See Donna Stienstra et al., *Report to the Judicial Conference Committee on Court Administration and Case Management, A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990 6-25* (FJC 1997).

12. See Judicial Conference of the United States, *The Civil Justice Reform Act*

quired that the Judicial Conference "include in its report a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the six principles and guidelines of litigation management and cost and delay reduction identified in" the CJRA.¹³ Had the Judicial Conference proposed that the pilot court experimentation be expanded beyond the ten participating courts, the Conference was to "initiate proceedings for the prescription of rules implementing its recommendation pursuant to" the Rules Enabling Act.¹⁴ If the Conference did not propose the pilot program's extension, the Conference was to "identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report, and [could] initiate proceedings for the prescription of rules implementing its recommendation, pursuant to" the Rules Enabling Act.¹⁵

The Conference observed in the report that it had reviewed the independent analysis of the pilot district experimentation conducted by the RAND Corporation, the FJC's evaluation of the demonstration program, and the experiences of the ninety-four courts in implementing their cost and delay reduction plans.¹⁶ The Conference determined that the districts had adopted most of the principles, guidelines and techniques in the CJRA, but the Conference did "not support expansion of the Act's case management principles and guidelines to other courts as a total package."¹⁷

The Judicial Conference based its recommendation substan-

of 1990 Final Report, Alternative Proposals for Reduction of Cost and Delay Assessment of Principles, Guidelines and Techniques (1997), reprinted in 175 F.R.D. 62 (1997) [hereinafter Judicial Conference Report]; see also Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 104(d), 105(c), 104 Stat. 5089, 5097-98 (1990); Pub. L. No. 104-317, 110 Stat. 3847, § 608. The Conference attached the RAND study as Appendix A and the FJC study as Appendix B to the report. I rely in this subsection on Carl Tobias, *The Judicial Conference Report and the Conclusion of Federal Civil Justice Reform*, 175 F.R.D. 351 (1998).

13. Judicial Improvements Act § 105(c)(2)(A), 104 Stat. at 5098; see also 28 U.S.C. § 473(a) (1994).

14. See Judicial Improvements Act § 105(c)(2)(B), 104 Stat. at 5098. The Rules Enabling Act, 28 U.S.C. §§ 2071-74, 2077 (1994), prescribes the process for amending the Federal Rules of Civil Procedure.

15. Judicial Improvements Act § 105(c)(2)(C), 104 Stat. at 5098. The statute required that the Judicial Conference only submit a "report of the results of the demonstration program" to Congress. See Judicial Improvements Act § 104(d), 104 Stat. at 5097.

16. See Judicial Conference Report, *supra* note 12, at 67, 73, 79-81.

17. *Id.* at 67 (emphasis in original).

tially on two important findings of the RAND assessment: first, that considerations other than judicial case management procedures drive litigation expenses; and second, that the pilot court experimentation per se did not appear to decrease significantly cost or delay because the districts were already following most of the statutorily-prescribed measures.¹⁸ The Conference noted the RAND Corporation's conclusion that six measures proffered by the CJRA are effective when used together, in reducing delay without increasing cost: "(1) early judicial case management; (2) early setting of the trial schedule; (3) shortening discovery cutoff; (4) periodic public reporting of the status of each judge's docket; (5) conducting scheduling and discovery conferences by telephone; and (6) implementing the advisory group process."¹⁹

The Judicial Conference report, accordingly, afforded proposed alternatives to the extension of the pilot program. These alternatives are premised essentially on statutory experimentation as well as findings, commentary and recommendations regarding specific procedures for efficacious case management.²⁰ The alternative measures and suggestions constituted the Conference's alternative cost and delay reduction program as required by the Civil Justice Reform Act.²¹ This alternative program included eight measures that the judiciary is to effectuate, three approaches which require congressional and executive branch cooperation, six recommendations regarding the CJRA principles and guidelines, and six suggestions respecting the CJRA techniques.

b. Alternative Program

i. Measures that the Judiciary is to Implement

The Conference considered eight ideas that the judiciary is to implement. First, the Conference proposed that the advisory group process instituted by the CJRA which facilitated the participation of lawyers and litigants in the administration of justice in all of the district courts continue.²² Second, the Conference endorsed the statutory docket reporting requirements because

18. See *id.* at 66-67, 80.

19. *Id.* at 67; see also *id.* at 80.

20. See *id.* at 67, 74, 82.

21. See *id.* at 67; see also *supra* note 15 and accompanying text.

22. See Judicial Conference Report, *supra* note 12, at 67, 82-83; see also 28 U.S.C. § 478 (1994). For example, the advisory groups facilitated bench-bar interchange, enhancing appreciation for the difficulties that each faces.

they proved effective in decreasing case disposition time.²³ Third, the Conference suggested that courts be encouraged to set early and firm trial dates and shorter discovery periods in complicated law suits, as the measures can save time without increasing cost.²⁴ Fourth, the Conference called for the effective employment of magistrate judges in part because the RAND analysis found that "some magistrate judges may be substituted for district judges on non-dispositive pre-trial activities without" detriments and with greater lawyer satisfaction.²⁵ Fifth, the Conference suggested that case management duties of chief judges be enhanced as those judicial officers are critical institutional leaders, especially in facilitating caseload management.²⁶ Sixth, the Conference recommended the encouragement of intercourt and intracourt judicial assignments which can foster effective case management by reducing backlogged dockets.²⁷ Seventh, the Conference proposed that education respecting effective case management be expanded to the entire legal community, as extension would "greatly facilitate case management efficiency in the federal judicial system."²⁸ Eighth, the Conference suggested that electronic technologies' use in district courts be encouraged, when appropriate, because those technologies can save considerable time and cost in civil litigation.²⁹

ii. Measures Requiring Legislative and Executive Branch Cooperation

The Judicial Conference explored three approaches which require legislative and executive branch cooperation. First, the Conference asked for greater recognition of the effect that judicial openings have on litigation delay, remarking that "[t]hirty-nine of the CJRA advisory group reports cite the length of time required to fill a judicial vacancy as a fundamental cause of delay."³⁰ Second, the Judicial Conference sought increased rec-

23. See Judicial Conference Report, *supra* note 12, at 69-70, 82-83. See generally R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687 (1993).

24. See Judicial Conference Report, *supra* note 12, at 68, 83-84.

25. *Id.* at 68, 84.

26. See *id.*

27. See *id.* at 68-69, 84; see also Judicial Conference of the United States, Long Range Plan for the Federal Courts 98-101 (1995); 28 U.S.C. §§ 291-97, 636 (1994). See generally Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. No. 2 (forthcoming May 1998).

28. See Judicial Conference Report, *supra* note 12, at 69, 85.

29. See *id.* at 69, 85-87.

30. Judicial Conference Report, *supra* note 12, at 69; see Final Report of the

ognition of the impact that the enactment of new criminal and civil legislation, which is beyond the courts' control, has on federal district courts' civil dockets and resources.³¹ The Conference urged Congress to consider the detrimental effects of mounting criminal prosecutions, the "federalization" of criminal law, and the recognition of more civil causes of action on civil cases' overall disposition as well as the consequences of those phenomena for the size of the federal bench.³² Third, the Judicial Conference admonished that adequate courtroom space facilitates judicial case management and should be available.³³ The Conference observed that having courtrooms available permits judges to resolve cases expeditiously by setting firm trial dates, thus promoting settlement of considerable civil litigation and prompt resolution of those lawsuits which actually go to trial.³⁴

iii. Suggestions Relating to the CJRA Principles and Guidelines

The Judicial Conference also included suggestions relating to the CJRA principles and guidelines. The Conference recommended that particular districts continue determining locally the best case management method.³⁵ The Conference endorsed the concepts of setting early, firm trial dates and imposing shorter discovery deadlines which the RAND analysis found to be among the most effective constituents of the Civil Justice Reform Act.³⁶ The Judicial Conference correspondingly endorsed reliance on discovery management plans in the form of discovery schedules,

Advisory Group United States District Court for the Eastern District of New York 27-28 (1991); Report of the Civil Justice Reform Act Advisory Group of the United States District Court for the Eastern District of California 51-56 (1991). Chief Justice William Rehnquist recently criticized the Senate and the President for failing to expedite judicial appointments. See William H. Rehnquist, *The 1997 Year-End Report on the Federal Judiciary* (1997).

31. See Judicial Conference Report, *supra* note 12, at 69-70, 88-89; see also Long Range Plan, *supra* note 27, at 23-32.

32. See Judicial Conference Report, *supra* note 12, at 69-70, 88-89; see also Gordon Bermant et al., *Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications* (1993); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268-69 (1996).

33. See Judicial Conference Report, *supra* note 12, at 70, 89.

34. See *id.*

35. For example, the Conference encouraged courts to ascertain whether their dockets require the "track model or the judicial discretion model for their differentiated case management (DCM) systems." *Id.* at 70, 89-93; see also 28 U.S.C. § 473(a)(1) (1994). See generally Stienstra et al., *supra* note 11, at 29-132.

36. See Judicial Conference Report, *supra* note 12, at 70, 93-95; see also 28 U.S.C. § 473(a)(2)(B), (C) (1994).

scheduling orders and staged discovery management.³⁷ The Conference also determined that the RAND evaluation included inadequate material, except data regarding mandatory pre-discovery disclosure, to offer a recommendation relating to the voluntary exchange of information.³⁸

The Judicial Conference observed that the CJRA principle requiring attorneys to meet and confer before filing discovery motions appears in some 1993 amendments to Federal Rules of Civil Procedure 26 through 37 and, therefore, endorsed the idea.³⁹ The Conference endorsed increased experimentation with appropriate types of alternatives to dispute resolution because many districts have determined that ADR benefits litigants, even though the RAND analysis found that ADR offered no "significant positive cost and delay impact."⁴⁰

iv. Suggestions Relating to the CJRA Techniques

The Judicial Conference as well included recommendations governing the CJRA techniques. The Conference stated that the 1993 revision of Federal Rule of Civil Procedure 26(f) generally prescribed the submission of joint discovery plans at initial pre-trial conferences.⁴¹ Because the RAND evaluation found that this procedure failed to reduce significantly time to resolution, the Conference did not suggest more requirements but proposed

37. See Judicial Conference Report, *supra* note 12, at 70, 95-97; see also 28 U.S.C. § 473(a)(2)(C), (3)(c) (1994). The Conference, thus, proposed that the Judicial Conference Committee on Rules of Practice and Procedure continue its effort to re-evaluate discovery's scope and substance, particularly whether the benefits of nationally-uniform Federal Rules outweigh the benefits of locally-developed measures as alternatives to Federal Rule of Civil Procedure 26(f) and the effects of districts using alternative procedures. See Judicial Conference Report, *supra*, at 70-97.

38. See Judicial Conference Report, *supra* note 12, at 70-71, 98; see also 28 U.S.C. § 473(a)(4) (1994).

39. See Judicial Conference Report, *supra* note 12, at 71, 98-99 (stating that "no further recommendation is necessary"); see also 28 U.S.C. § 473(a)(5) (1994); FED. R. CIV. P. 26(c), (f); FED. R. CIV. P. 37(a)(2).

40. Judicial Conference Report, *supra* note 12, at 71, 99-102; see also 28 U.S.C. § 473(a)(6) (1994). See generally Stienstra et al., *supra* note 11, at 173-283. The Conference, thus, supported the continued reliance on promising forms of ADR, suggested that courts keep developing effective ADR programs, and recommended that the Committee on Rules of Practice and Procedure review districts' use of alternatives and assess whether changes in the Federal Rules are needed to increase ADR's role. See Judicial Conference Report, *supra* note 12, at 71, 102. See generally Elizabeth Plapinger & Donna Steinstra, ADR and Settlement in the Federal District Courts (FJC 1996).

41. See Judicial Conference Report, *supra* note 12, at 71, 103; see also 28 U.S.C. § 473(b)(1) (1994); FED. R. CIV. P. 26(f).

that the Committee on Rules of Practice and Procedure assess the technique in its continuing analysis of discovery.⁴² The Judicial Conference analogously observed that 1993 changes to Federal Rule of Civil Procedure 16(c) included the requirement that a representative with authority to bind the parties be present at all pretrial and settlement conferences and, thus, made no additional proposal regarding this procedure.⁴³

The Judicial Conference did not endorse the concept of requiring counsel and litigants to sign requests for discovery extensions or postponements of trials, citing the technique's "almost universal rejection."⁴⁴ The Conference concomitantly supported the use of Early Neutral Evaluation as a proper form of ADR.⁴⁵ The Judicial Conference acknowledged that judicial officers must be accessible to supervise pretrial activities and that reliance on magistrate judges can foster more efficient case management in the districts and lawyer satisfaction.⁴⁶ The Conference, accordingly, called for the effective use of the judicial officers, especially in ADR programs, consistent with Recommendation 65 in the Long Range Plan compiled by the Conference.⁴⁷

c. Concluding Observations

The Judicial Conference, in some concluding observations, found that the CJRA had promoted intensive efforts of judges, attorneys and other representatives of parties to analyze the conditions of the districts and experiment with innovative means of managing federal civil litigation and that these endeavors would continue to affect federal court business directly and positively.⁴⁸ The Conference concurred in the RAND evaluation statement that the CJRA process had "raised the consciousness" of judges and lawyers, facilitating actions that make civil cases

42. See Judicial Conference Report, *supra* note 12, at 71, 103.

43. See *id.* at 71-72, 103-106; see also FED. R. CIV. P. 16(c).

44. Judicial Conference Report, *supra* note 12, at 72, 104; see also 28 U.S.C. § 473(b)(3)(1994).

45. See Judicial Conference Report, *supra* note 12, at 72, 104-05; see also 28 U.S.C. § 473(b)(4) (1994); *supra* note 40 and accompanying text. Under ENE, an independent expert assesses a case early in the litigation process.

46. See Judicial Conference Report, *supra* note 12, at 68, 84; see also *supra* note 25 and accompanying text.

47. See Judicial Conference Report, *supra* note 12, at 68, 84; Long Range Plan, *supra* note 27, at 101-02; see also *supra* note 25 and accompanying text. Recommendation 65 called for maximizing reliance on use of magistrate judges consistent with constitutional requirements and sound judicial policy.

48. See Judicial Conference Report, *supra* note 12, at 72-73, 107.

less prolonged and costly and improving the civil justice system.⁴⁹ The Conference promised that the federal bench would continue efforts to enhance the delivery of justice in civil lawsuits but warned that the judiciary will confront numerous challenges and issues regarding civil justice reform.⁵⁰ The Conference pledged that federal judges would pursue more improvements in case management “[w]ith the needs of justice foremost in mind” and would welcome the ongoing interest and support of the legislative and executive branches, the bar and the public in doing so.⁵¹

d. Constructive Criticisms of the Judicial Conference Report

The Judicial Conference seemed to achieve technical compliance with the strictures that the CJRA imposed on it, and the Conference apparently posited reasonable substantive conclusions. The Conference did assemble a report which included an evaluation of the pilot program that was based on a “study conducted by an independent organization with expertise in the area of Federal court management.”⁵² The Judicial Conference concomitantly included in the report a suggestion against “expansion of the Act’s case management principles and guidelines to other courts as a total package”⁵³ and a set of alternatives which the Conference intended to reduce expense and delay.⁵⁴

The alternative program for decreasing cost and delay which the Judicial Conference proposed could have been more ambi-

49. *See id.*

50. The challenges facing civil justice reform, as articulated by the Conference, include:

(1) increasing speed of disposition while preserving the quality of justice; (2) striking an appropriate balance between national uniformity and local option in development of litigation procedures; (3) assessing the differential financial impact of CJRA-sponsored procedural reforms on various kinds of litigants and on attorneys; (4) evaluating the specific data on the impact of individual case management methods on the speed and cost of civil litigation; and (5) perhaps most importantly, confronting the practical limits to which general rules and procedures can be used to manage litigation.

Id. at 72-73.

51. *Id.* at 73, 109.

52. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105(c), 104 Stat. 5089, 5098 (1990); *see also supra* notes 5-6, 9, 12 and accompanying text.

53. Judicial Conference Report, *supra* note 12, at 67 (emphasis in original); *see also* Judicial Improvements Act § 104(c)(2)(A), 104 Stat. at 5098; *see also supra* notes 9, 15, 17 and accompanying text.

54. *See* Judicial Conference Report, *supra* note 12, at 67; *see also* Judicial Improvements Act, Pub. L. No. 101-650, § 105(c)(2)(C), 104 Stat. 5098; *supra* notes 22-47 and accompanying text.

tious by calling for the application of new means of saving expense and time. Nevertheless, the reform that Congress meant to implement in the Civil Justice Reform Act of 1990 was rather modest, partly "because the courts were already following most of the Act's principles, guidelines, and techniques and more importantly, the cost of litigation was driven by factors other than judicial case management procedures," as the Judicial Conference report and the RAND analysis stated.⁵⁵

The Judicial Conference might correspondingly have improved its report by attempting to delineate other procedures that were effective in limiting cost or delay. For example, some courts, including the Montana District, determined that greater reliance on magistrate judges was advantageous.⁵⁶ The Judicial Conference report did mention certain efforts,⁵⁷ but it could have scrutinized and discussed the endeavors in more detail and even included specific suggestions respecting them.

The Judicial Conference might also have attempted to clarify whether the CJRA and procedures prescribed under the legislation actually expired on December 1, 1997, even though Congress enacted the CJRA and should have major responsibility for clarifying it. The statutory wording did not clearly provide that the Civil Justice Reform Act of 1990 would expire on December 1, 1997.⁵⁸ Moreover, the applicable legislative history which accompanied the enactment was limited and somewhat ambiguous.⁵⁹ This language and the attendant legislative history might

55. Judicial Conference Report, *supra* note 12, at 63.

56. See, e.g., Annual Assessment of the Civil Justice Expense and Delay Reduction Plan of the United States District Court for the District of Montana 3-4 (1994); see also Tobias, *Re-evaluating*, *supra* note 1, at 313; Report of the Civil Justice Reform Act Advisory Group to the United States District Court for the District of Oregon Appointed Under the Civil Justice Reform Act of 1990 7, 17-18 (1991).

57. See, e.g., Judicial Conference Report, *supra* note 12, at 63-64, 67, 81, 96-99; see also *supra* notes 25, 46-47 and accompanying text.

58. The statute provides that the requirements set forth in sections 471 through 478 of title 28, United States Code, the CJRA "shall remain in effect for seven years after" the December 1, 1990 date of enactment. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 103(b)(2), 104 Stat. 5096. I rely in the remainder of this subsection on Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM No. 3 (June 1998).

59. Subsection (b)(2) subjects sections 471 through 478 of the Civil Justice Reform Act to a seven-year sunset provision so that those sections can be thoroughly tested. Upon the expiration of the seven-year period following enactment, Federal district courts are no longer required to operate pursuant to the civil justice expense and delay reduction plans mandated by Title I. Congress and the courts then will have a change to evaluate those provisions and, if warranted, reauthorize them. S. Rep. No. 101-36, 101st Cong. 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802.

be construed as suggesting that federal districts could stop applying the cost and delay reduction procedures on December 1, 1997, but the phrasing and history may also be read as indicating that Congress and the courts were to make a positive determination about reauthorizing the CJRA and requirements which courts adopted under the statute.

Unfortunately, the first session of the 105th Congress recessed in mid-November without definitively resolving the question of the CJRA's continuing applicability, although it took some relevant action. Congress passed legislation that expressly authorized continuation of the case reporting strictures in section 476 of the CJRA under which the Administrative Office compiled semiannual public statistical summaries regarding the status of motions and bench trials that had been pending for greater than six months and lawsuits that had been pending more than three years.⁶⁰ However, the 1997 legislation effectively left section 103(b) as Congress passed the provision in 1990.⁶¹

The most plausible construction of the CJRA's phrasing and legislative history and the best interpretation of the congressional activity and the judicial inaction reviewed is that failure to reauthorize the 1990 enactment with greater clarity means that the statute did sunset on the first of December. If this reading is accurate, it would correspondingly indicate that any procedures which the ninety-four districts prescribed or applied under the 1990 statute and which conflict with the Federal Rules of Civil Procedure or with Acts of Congress should also expire.⁶²

B. Montana Developments

During 1994, the Ninth Circuit Judicial Council and its Chief District Judges Conference created the Ninth Circuit District Local Rules Review Committee (LRRC). The purpose of the LRRC was to assist the council in discharging its responsibilities for periodically reviewing local district procedures and abrogating or modifying those that conflict with or duplicate the Federal

60. See Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997); see also 28 U.S.C. § 476 (1994); *supra* notes 16, 21 and accompanying text.

61. See Pub. L. No. 105-53, § 2, 111 Stat. 1173; see also *supra* notes 58-59 and accompanying text.

62. See 28 U.S.C. § 2071(a) (1994); FED. R. CIV. P. 83. One exception to the ideas about inconsistent measures prescribed under the CJRA is the provision in certain 1993 federal civil rules amendments, principally governing discovery, which authorizes the courts to adopt and apply procedures that vary from the Federal Rules. See, e.g., FED. R. CIV. P. 26(a)(1).

Rules of Civil Procedure and United States Code provisions.⁶³ The LRRC recently completed its review of local procedures adopted by the fifteen districts in the Ninth Circuit to determine whether the measures contravene, or duplicate, the Federal Rules or Acts of Congress.⁶⁴ The Committee submitted its report and suggestions relating to each districts' procedures and future procedural review to the Ninth Circuit Judicial Council in early 1997.⁶⁵ At the judicial council's February meeting, Chief Judge Procter Hug, Jr., appointed a committee comprised of Chief Judge Judith Keep of the United States District Court for the Southern District of California and Chief Judge Edward Lodge of the United States District Court for the District of Idaho to review the work of the LRRC and report to the council.⁶⁶ This committee found that most districts had agreed to alter numerous procedures at the LRRC's instigation.⁶⁷ During the May meeting of the council, it decided not to abolish or change any local measures and to continue working with districts on those procedures which courts had stated they would modify.⁶⁸

In the Winter 1997 issue of this journal, I observed that a three-judge panel of the Ninth Circuit had concluded that the Montana District's opt-out provision for securing consent to magistrate judge jurisdiction in civil cases contravened Section 636 of Title 28 of the United States Code.⁶⁹ The Ninth Circuit refused to "infer consent from silence because such consent does not meet the required 'clear and unambiguous manifestation' stan-

63. I rely substantially in the remainder of this subsection on Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995) and on my experience as a member of the LRRC; see also Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555 (1996); Tobias, *Continuing*, *supra* note 1, at 147-48.

64. See 28 U.S.C. § 332(d)(4) (1994); see also FED. R. CIV. P. 83. Rule 83's 1995 revision also requires that local procedures not duplicate Federal Rules and Acts of Congress, and the LRRC attempted to implement this command. See FED. R. CIV. P. 83. For discussion of the committee's earlier work, see Tobias, *Contemplating*, *supra* note 1, at 283-84.

65. See District Local Rules Review Committee, Report to the Ninth Circuit Judicial Council, Executive Summary (1997).

66. Telephone interview with Margaret Johns, Chair, LRRC (Apr. 23, 1997).

67. Telephone interview with Margaret Johns, Chair, LRRC (Dec. 15, 1997).

68. See *id.*

69. See *Laird v. Chisholm*, No. 94-35710, 1996 WL 205487 (9th Cir. Apr. 26, 1996); see also Tobias, *Contemplating*, *supra* note 1, at 284. Under the opt-out provision, litigants whose civil cases are assigned to magistrate judges are deemed to have consented to magistrate judge jurisdiction if the parties do not object within a certain time. See Mt. R. 105-2(d).

dard.⁷⁰ Despite this ruling, the Montana District's opt-out provision does remain in effect. The magistrate judges believe that they are satisfying the Ninth Circuit opinion and the United States Code stricture by ignoring the opt-out provision in the Montana local rules and by informing counsel and parties of the opportunity to consent during scheduling conferences.⁷¹ However, the court apparently intends to retain the local rule prescribing opt-outs, and some parties have recently been held to have consented to a magistrate judge's jurisdiction under that provision.⁷² The district also plans to maintain the judicial case management procedures that it premised in part on the CJRA, even after the statute expires, a development that was scheduled to occur in December of 1997.⁷³

In the Winter 1997 issue of the *Montana Law Review*, I also reported that the Montana District's Article III judges had issued an October 9, 1996, general order, which controls "case assignments for all matters filed in any division of the court on or after October 1, 1996, until otherwise modified by order of the Chief Judge."⁷⁴ The order effectively allocates civil and criminal cases among Article III judges and magistrate judges in the court's five divisions to reflect District Judge Paul G. Hatfield's assumption of senior status and District Judge Donald W. Molloy's assumption of the active judgeship left vacant when Judge Hatfield assumed senior status.⁷⁵ More specifically, Judge Hatfield carries a full civil caseload, while Judge Molloy

70. See *Laird*, 1996 WL 205487, at *2 (citing *In re San Vicente Med. Partners Ltd.*, 865 F.2d 1128, 1130 (9th Cir. 1989)).

71. Telephone interview with Leif B. Erickson, U.S. Magistrate Judge for the Montana District (Nov. 6, 1996); see also D. MONT. R. 105-2(d).

72. Chief Judge Jack Shanstrom, U.S. District Court Judge for the Montana District, Address at the Montana State Bar, Federal Practice Section, Continuing Legal Education Program (Apr. 18, 1997). The Ninth Circuit recently dismissed for want of jurisdiction a case assigned to a magistrate judge pursuant to a general order which had proceeded to judgment because the record included no written consent of the litigants required by 28 U.S.C. § 636(c)(1) and Federal Rule of Civil Procedure 73(b). See *Aldrich v. Bowen*, 130 F.3d 1364 (9th Cir. 1997).

73. See Chief Judge Jack Shanstrom, U.S. District Court Judge for the Montana District, Address at the Montana State Bar, Federal Practice Section, Continuing Legal Education Program (Apr. 18, 1997); see also *supra* notes 58-62 and accompanying text.

74. Tobias, *Contemplating*, *supra* note 1, at 284 (quoting Assignment of Cases General Order No. 2, at 1 (D. Mont. Oct. 9, 1996)).

75. For example, "civil cases in the Billings Division shall be assigned to Chief Judge Jack D. Shanstrom and to Magistrate Judge Richard W. Anderson in accordance with the Local Rules," and each judicial officer is to be assigned fifty percent of those cases, "except as otherwise provided by statute." Assignment of Cases General Order No. 2, at 2 (D. Mont. Oct. 9, 1996).

resolves criminal cases in Butte, Great Falls, and Missoula and civil disputes in Butte and Missoula.⁷⁶

Lawyers and parties who participate in civil cases in Judge Molloy's court should be aware that he treats preliminary pretrial conferences as an opportunity to review cases thoroughly and to settle and stipulate as many issues as possible.⁷⁷ Those conferences can consume as much as several hours, and the judge relies on the specific components of Federal Rule of Civil Procedure 16 in conducting the conferences.⁷⁸ Anecdotal evidence suggests that these efforts have expedited the resolution of some litigation.

II. A GLANCE INTO, AND SOME SUGGESTIONS FOR, THE FUTURE

A. National

Numerous federal district courts have concluded, or are completing, experimentation under the Civil Justice Reform Act with a number of procedures which are meant to decrease expense or delay in civil cases. More definitive determinations respecting the measures' effectiveness must await additional evaluation, especially in the courts which are not EIDCs and which have been applying and assessing the mechanisms for less time. The Judicial Conference relied upon the RAND Corporation examination of pilot district experimentation and the Federal Judicial Center study of the demonstration court program in submitting its reports and a recommendation to Congress in May, so that Congress could determine before December 1 whether the CJRA should expire. However, the Conference has taken no official position on statutory expiration, and the Congress did not conclusively resolve the issue.

Congress or the Conference, therefore, must promptly resolve the doubt about the statute's expiration, because lingering uncertainty as to the continuing applicability of the Civil Justice Reform Act and local measures adopted under it may be complicating federal civil practice. Congress enacted the legislation and

76. Judge Donald W. Molloy, U.S. District Court Judge for the Montana District, Address at the Montana State Bar, Federal Practice Section, Continuing Legal Education Program (Apr. 18, 1997).

77. See *id.*

78. See *id.* Attorneys and litigants may also want to consult Judge Molloy's recent directive relating to practice in his court, particularly the use of technology. See Donald W. Molloy, Reflections and Thoughts About Litigation in an Electronic Court (1998) (on file with the *Montana Law Review*).

should address it. Should Congress not act, the Judicial Conference could clarify the question by clearly observing that the statute has expired and that conflicting procedures applied pursuant to it must be abrogated while informing all ninety-four courts of its perspectives. Numerous districts would comply with Judicial Conference resolution of the issue. In any event, each court could attempt to clarify uncertainty by abolishing local measures prescribed under the CJRA which contravene the Federal Rules or statutes. Congress, the Judicial Conference and individual districts might also attempt to delineate procedures receiving experimentation apart from those that the Judicial Conference identified which decreased cost or delay in civil litigation so that the measures could be included in the Federal Rules of Civil Procedure or receive additional experimentation.

B. Montana

The Montana District should modify the provision for acquiring consent to magistrate judge jurisdiction in civil cases in its local rules to reflect that rule's recent invalidation by the Ninth Circuit.⁷⁹ The best means of attaining this result may be substituting a mechanism which better insures voluntary affirmative consents to jurisdiction.⁸⁰ The district should analyze the provision governing automatic disclosure to determine whether it is operating effectively, especially as compared with similar measures that other courts have employed.⁸¹ The Montana District might want to consider completing some form of final assessment of experimentation under the CJRA since 1990 in the court and could begin assembling, assessing and preserving all applicable material on experimentation.

III. CONCLUSION

All of the federal district courts have finished, or are completing, their experimentation with measures for reducing cost and delay in civil litigation and evaluating the procedures' effectiveness. The Judicial Conference recently submitted its reports and a recommendation to Congress on the pilot and demonstra-

79. See *supra* notes 69-72 and accompanying text.

80. See *supra* note 71 and accompanying text.

81. See Tobias, *Continuing*, *supra* note 1, at 149-50; see also Donna Stienstra, Federal Judicial Center, Implementation of Disclosure in District Courts With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (1997).

tions programs. The second session of the 105th Congress should seriously consider the Conference reports and suggestion and should clarify whether the CJRA has actually expired. The Montana District should change its procedure for securing consent to magistrate judge jurisdiction in civil cases to conform with the recent Ninth Circuit opinion which invalidated the Montana provision. The court should also assess the efficacy of its automatic disclosure strictures and consider preparing a final evaluation of CJRA experimentation.

